AMERICANS UNITED FOR LIFE

Worse than Souter: A Comparison Chart

As Americans United for Life President & CEO Charmaine Yoest wrote in the *Washington Times*:

When President Obama nominated Judge Sonia Sotomayor to the U.S. Supreme Court, the conventional wisdom was that she would be an apt replacement for retiring Justice David H. Souter, maintaining the high court's "balance" — or, more accurately, its lopsided liberal tilt.

"But Team Obama knows something most Americans don't. When it comes to the landmark 1973 decision Roe v. Wade and the abortion cases that have since made it to the Supreme Court, Sotomayor is no Souter. Rather, her record shows that for the overwhelming majority of Americans who support at least some restrictions on abortion, she is worse than Justice Souter — reading a "fundamental right" to abortion into the Constitution.

The following chart, compiled by AUL's legal experts, gives in-depth background on how Supreme Court Justice David Souter's record compares with Judge Sotomayor's history of abortion advocacy through her work with the Puerto Rican Legal Defense and Education Fund (PRLDEF). Judge Sotomayor has never disavowed the fund's radical pro-abortion views, which were fully on display during her twelve years as an active member of its governing board.

Abortion		
Issue	**Justice Souter**	**Judge Sotomayor**

Overall View of "Right" to Abortion	In his abortion decisions, including *Planned Parenthood v. Casey* (1992), Justice Souter has treated abortion as a constitutionally protected – but not fundamental – right. Thus, under his view, states, while not able to completely prohibit abortion, may enact common-sense regulations on abortion.	Justice Sotomayor has a long record of leadership and activism with the Puerto Rican Legal Defense and Education Fund (PRLDEF), a group that sees abortion as a fundamental right akin to the right to free speech and the right to vote – rights that, unlike abortion, are actually enumerated in the Constitution. She has never disavowed the positions that the PRLDEF held on her watch. Before becoming a judge, she served as a member of the governing board of the PRLDEF and was, according to a number of the fund's lawyers, "an involved and ardent supporter of their various legal efforts" (*New York Times*, May 28, 2009). In at least six amicus briefs filed in U.S. Supreme Court abortion cases (between 1980 and 1992), PRLDEF argued that abortion is a fundamental right and that any restrictions on abortion are subject to the harshest level of judicial scrutiny. As a result, it argued, such regulations should be ruled unconstitutional – particularly the common-sense regulations that Judge Souter has consistently upheld.
State Policy Declaring that Life Begins at Conception	No information.	Based on her view of abortion as expressed in the PRDLEF briefs, Judge Sotomayor would likely vote to invalidate such statements as a threat to what she perceives as a woman's fundamental right to an abortion. In fact, in *Webster v. Reproductive Health Services* (1989), PRDLEF urged the Supreme Court to invalidate a Missouri law in its entirety including a preamble declaring that the state's policy position that human life begins at conception.

Freedom of Choice Act (FOCA)	FOCA treats abortion as a fundamental right – a view the Justice Souter has repeatedly rejected.	Based on arguments made in PRLDEF amicus briefs, Judge Sotomayor believes that abortion is a fundamental right and will likely read FOCA's radical principles into the U.S. Constitution.
Partial-Birth Abortion	In *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007), Justice Souter voted to strike down both state and federal bans on partial-birth abortion.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any federal or state ban on partial-birth abortion.
Limitations on Post-Viability Abortion	No information.	Judge Sotomayor's PRLDEF record indicates she would be firmly against such limitations. In fact, in the brief it filed in *Webster v. Reproductive Health Services* (1989), the PRDLEF urged the Supreme Court to strike down a Missouri law requiring viability testing before certain abortions — calling such testing "useless and expensive."

Informed Consent	In *Planned Parenthood v. Casey* (1992), Justice Souter voted to uphold Pennsylvania's informed consent law and 24-hour reflection period.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down state informed consent laws, denying women complete and accurate medical information about abortion, its complications, and its consequences. In an amicus brief filed in *Casey*, PRLDEF urged the Court to apply strict scrutiny and strike down Pennsylvania's informed consent requirements and reflection period. The Fund declared that it "**oppose[d] any efforts to . . . in any way restrict the rights recognized in** *Roe v. Wade;***" compared abortion to the specifically-enumerated right to free speech, and argued that any "burden" on the right to abortion was unconstitutional.** **Earlier in *Webster v. Reproductive Health Services* (1989), the Fund had opposed a requirement that physicians personally counsel women seeking an abortion – a requirement that the Supreme Court has found to be medically appropriate and completely reasonable. Moreover, it characterized informed consent requirements as "intrusive," "distorted," and** "designed to frighten women from obtaining abortions."
Ultrasound Requirements	No information.	Judge Sotomayor's PRDLEF record indicates she is against such requirements. The Fund's brief in *Webster v. Reproductive Health Services* (1989) argued against "ultrasound testing" for every abortion.

Parental Involvement	Justice Souter has twice voted to uphold state parental-involvement laws: *Planned Parenthood v. Casey* (1992) (Pennsylvania's parental-consent law) and *Lambert v. Wicklund* (1997) (Montana's parental-notice law). Moreover, in *Ayotte v. Planned Parenthood* (2006), he voted to overturn a lower court's injunction invalidating New Hampshire's parental notice law in its entirety, recognizing that the law would likely be constitutional in (at least) some applications.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down both parental-consent and parental-notice laws, failing to protect both children and parental rights. In an amicus brief filed in *Ohio v. Akron Center for Reproductive Health* (1990), PRLDEF again declared, **"The Fund opposes any efforts to . . . in any way restrict the rights recognized in** *Roe v. Wade***"** and championed on a "fundamental right to abortion. Moreover, it argued that "adolescent women's right to choose [should] not [be] infringed by [parental] notification statutes," insisting that minors should be "protected against parental involvement that might prevent or obstruct the exercise of their right to choose." The Supreme Court rejected these arguments and upheld the law. Later, in an amicus filed in *Casey* (1992), PRLDEF unsuccessfully urged the Court to ignore its previous ruling in *Akron* and to strike down Pennsylvania's parental-consent law.

Limits on the Use of Taxpayer Funding	In *Rust v. Sullivan* (1991), Justice Souter voted to uphold prohibitions on the use of federal Title X funding for abortion counseling and referrals.	In *Center for Reproductive Rights v. Bush* (2002), Judge Sotomayor, then with the Second Circuit and bound by both U.S. Supreme Court and Second Circuit precedents, upheld the "Mexico City policy" (which prohibits non-governmental organizations from using taxpayer funding to advocate for abortion overseas) against a challenge from an abortion advocacy group. Ultimately, Judge Sotomayor agreed with the government's argument that it had a rational basis for favoring "the anti-abortion position over the pro-choice position" with public funds. However, in two separate amicus briefs filed before the U.S. Supreme Court, the PRLDEF argued against limitations on taxpayer funding of abortions. Specifically, *Williams v. Zbaraz* (1980), the Fund unsuccessfully argued that all "medically necessary" abortions (essentially, code words for abortion-on-demand) must be publicly funded and that failure to do so was "discriminat[ory]" and a violation of equal protection guarantees. Later, in *Rust v. Sullivan* (1991), the Fund again unsuccessfully argued that, since abortion is a "fundamental right," restrictions on Title X funding that prohibited the use of such funding to counsel on or refer for abortions should be invalidated.

Limitations on the Use of State Facilities and Personnel for Abortions	Given Justice Souter's support for other limitations on the use of taxpayer funding to promote or provide abortions, it is likely that he would find limitations on the use of state facilities and personnel constitutional.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any meaningful limits or prohibitions on the use of state facilities (such as public hospitals) or personnel for abortions. In an amicus brief filed in *Webster v. Reproductive Health Services* (1989), PRLDEF unsuccessfully urged the Court to apply strict scrutiny and strike down limitations on the use of state resources to provide abortions. The Fund argued that abortion is a "precious right;" that"all state-created obstacles" should be reviewed under strict scrutiny (the highest standard of judicial review reserved for fundamental rights); and that regulations that might increase the cost of abortion or decrease the ease of its availability were unconstitutional.
Regulation of Abortion Providers (includes regulation of the facilities and personnel that perform abortions)	In *Mazurek v. Armstrong* (1997), Justice Souter voted to uphold a Montana statute "restricting [the] performance of abortions to licensed physicians" only (*i.e.*, "physician-only" requirement). Moreover, while Justice Souter was on the Court, the Supreme Court twice refused to hear appeals of lower court rulings upholding comprehensive state abortion clinic regulations. *Greenville Women's Clinic v. Bryant* (reviewed denied in 2001 and again in 2003).	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any meaningful regulation of the facilities or specific medical personnel that perform or assist in the performance of abortions.

Abortion Reporting	In *Planned Parenthood v. Casey* (1992), Justice Souter voted to uphold a portion of a Pennsylvania law that required "record keeping and reporting" on abortions performed in the state, viewing such requirements as "reasonably directed to the preservation of maternal health."	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down reporting requirements on the incidence of abortion and its complications as "burdensome" on abortion providers. In an amicus brief filed in *Casey* (1992), PRLDEF unsuccessfully urged the Court to apply strict scrutiny and strike down Pennsylvania's record keeping and reporting requirements. Earlier, in *Webster v. Reproductive Health Services* (1989), PRLDEF argued that such requirements were solely designed to "harass" abortion patients and providers, completely ignoring the need for meaningful data in assess the safety and efficacy of abortion.
Regulation of Abortifacients (RU-486)	No information.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any regulation of abortifacients.
Funding of Abortion Alternatives (includes direct subsidies and "Choose Life" license plates)	Since Justice Souter joined the Court, the Supreme Court has refused to review decisions in three legal challenges to "Choose Life" license plate programs: *Rose v. Planned Parenthood* (2004) (successful challenge to South Carolina's program); *ACLU v. Breseden* (2006) (unsuccessful challenge to Tennessee's program); and *Stanton v. Arizona Life Coalition* (2008) (successful challenge by pro-life group to Arizona's refusal to issue the specialty plates despite the group's compliance with all legal prerequisites).	No information.
Legal Protection of the Unborn		

Issue	Justice Souter	Judge Sotomayor
Unborn Victims of Violence (also known as "fetal homicide" and "fetal assault")	No information.	No information.
Wrongful Birth and Wrongful Death (Civil) Lawsuits	In *Smith v. Cote* (1986), a case that Justice Souter decided as a member of the New Hampshire Supreme Court, he recognized a cause of action for wrongful birth: essentially, a claim brought by the parents arguing that, but for a physician's negligence in making prenatal diagnoses, they would have aborted a disabled, deformed, or sick child. Justice Souter and the majority held that, in some circumstances, parents may be injured by the imposition of extraordinary liabilities following the birth of a child. However, Justice Souter and the majority rejected the wrongful-life claim (brought on behalf of the child and arguing that the child should never have been born), holding that the courts should not become involved in deciding whether a given person's life is or is not worthwhile, and stating that "[t]he right to life, and the principle that all are equal under the law, are basic to our constitutional order."	No information.
Wrongful Death (Civil) Lawsuits in Death of Unborn Child	No information.	No information.
Born-Alive Infant Protection	No information.	No information.
Abandoned Infant Protection (also known as "Baby Moses" laws)	No information.	No information.

Biotechnologies		
Issue	**Justice Souter**	**Judge Sotomayor**
Bans on Human Cloning	No information.	No information.
Bans on Destructive Embryo Research (DER)	No information.	No information.
Bans on State Funding of DER	No information.	No information.
Policies Promoting Adult Stem-Cell Research and Other Ethical Alternatives	No information.	No information.
Regulation of Assisted Reproductive Technologies (such as IVF)	No information.	*In Saks v. Franklin Covey Co* (2003), Judge Sotomayor joined a Second Circuit opinion rejecting a claim that exclusion from coverage of surgical impregnation procedures, including *in vitro* fertilization, violated Title VII and the "Pregnancy Discrimination" Act.
End of Life		
Issue	**Justice Souter**	**Judge Sotomayor**
Assisted Suicide	In both *Washington v. Glucksberg* (1997) and *Vacco v. Quill* (1997), Justice Souter declined to find a federal constitutional right to assisted suicide, upholding state bans (in Washington and New York, respectively) on assisting a suicide. However, in *Gonzales v. Oregon* (2006), Justice Souter and the majority ruled that the federal "Controlled Substances Act" did not authorize the United States Attorney General, through interpretive rule, to prohibit the prescription of federal-regulated drugs for use in physician-assisted suicide.	
Promotion of Palliative Care	No information.	No information.

Healthcare Freedom of Conscience		
Issue	**Justice Souter**	**Judge Sotomayor**
Protection for Individual Healthcare Providers	No information.	No information
Protection for Healthcare Institutions	No information.	No information.
Protection for Insurance Providers and Other Healthcare Payers	No information.	No information.
First Amendment Rights of Abortion Demonstrators		
Issue	**Justice Souter**	**Judge Sotomayor**
Constitutionality of "Bubble Zones"	Justice Souter has repeatedly upheld municipal, city, and other ordinances prescribing a "bubble zone" around abortion clinics (within which demonstrators may not enter or engage in protected First Amendment speech). *See e.g., Madsen v. Women's Health Center* (1994); *Schenck v. Pro-Choice Network of Western New York* (1997), and *Hill v Colorado* (2000).	No information.
Other Related Issues	In *Scheidler v. NOW*, Justice Souter and the majority ruled that the federal "Racketeer Influenced and Corrupt Organizations Act" (RICO) could not be used in an effort to sustain a nationwide injunction and a damage award against anti-abortion demonstrators.	*In Amnesty America v. Town of West Hartford (2004),* Judge Sotomayor permitted demonstrators (who happened to be pro-life) to maintain their Fourth Amendment claims of unreasonable seizure against the town of West Hartford for the officers' use of allegedly excessive force in countering the demonstrators' passive resistance to arrest.